

# 15-3885-cv(L), 15-3886-cv(XAP)

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## United States Court of Appeals *for the* Second Circuit

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FOX NEWS NETWORK, LLC,

*Plaintiff-Appellee-Cross-Appellant,*

– v. –

TVEYES, INC.,

*Defendant-Appellant-Cross-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR *AMICI CURIAE* AMERICAN PHOTOGRAPHIC  
ARTISTS, AMERICAN SOCIETY OF MEDIA  
PHOTOGRAPHERS, DIGITAL MEDIA LICENSING  
ASSOCIATION, NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION AND PROFESSIONAL PHOTOGRAPHERS  
OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE-  
CROSS-APPELLANT**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the undersigned certifies that:

1. American Photographic Artists states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

2. American Society of Media Photographers, Inc. states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

3. Digital Media Licensing Association states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

4. National Press Photographers Association, Inc. states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

5. Professional Photographers of America states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

s/ Eleanor M. Lackman  
Eleanor M. Lackman

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## **STATEMENT OF INTEREST**<sup>1</sup>

American Photographic Artists (“APA”) is a leading non-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

American Society of Media Photographers, Inc. (“ASMP”) represents the interests of professional photographers whose photographs are created for publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

The Digital Media Licensing Association (“DMLA”) (formerly known as the Picture Archive Council of America, Inc.) is a not-for-profit trade association that represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 image libraries in North America and internationally that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual creators. Members include large general libraries, such as Getty Images (US), Inc. and Shutterstock, Inc., and smaller

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for a party authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *amici curiae*, their members, or counsel, contributed money intended to fund preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

specialty libraries that provide the media and commercial users with access to in-depth collections of content that represent all aspects of our society and culture, both historical and contemporary. DMLA has developed business standards, promoted ethical business practices, and actively advocated for copyright protection on behalf of its members. In addition, DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA’s approximately 6,000 members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the “The Voice of Visual Journalists,” vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The Professional Photographers of America (“PPA”) is the world’s largest photographic trade association. PPA’s membership consists of more than 29,000 direct members and an additional 20,000 affiliated members through the more than 150 independent organizations that have elected to affiliate with PPA. In total, PPA’s membership reach includes some 50,000 professional photographers from dozens of specialty areas including portrait, wedding, commercial, advertising, and

art. For more than 140 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

### **SUMMARY OF ARGUMENT**

The District Court's analysis in this case represents an unprecedented expansion of the law of fair use in the realm of content digitization and copying, based on the vague notion of public benefit. What the District Court, as well as TVEyes and its *amici*, fail to realize is that the purported "benefit" afforded to the public by the mass unauthorized copying and delivery of a vast body of digital content goes only skin deep. While the media and the public may nominally be enriched by TVEyes' service, the unintended consequences of blessing such services as fair use outweighs the presumed benefits.

Affirming the District Court would have a dire impact on the audiovisual content licensing industry, particularly with regard to licensors of audiovisual and visual content and the individual creators they represent, such as the members of *amici* here. These authorized aggregators of creators' video footage, film clips, photographs, and other visual imagery (hereinafter "content aggregators") comprise a substantial industry that has spent significant time, effort, and resources moving into the digital age over the last decade. With massive online libraries containing a diverse array of material, content aggregators offer high-quality

content to the media and the general public through secure, user-friendly, text-searchable interfaces. The content they offer is paid for through licensing arrangements with content owners, and is offered to end-users for fees that vary based on the type of content and the type of license available. Individual photographers and videographers rely on their authorized content aggregators to license their creative works.

Affirming the District Court would also perpetuate the erroneous conclusion that TVEyes' service does not supplant the market for licensed content, including content made available through content aggregators who, through contractual relationships, share licensing revenue with the individual creators. The valuable and well-established visual image licensing services provided by organizations such as members of *amici* would be completely displaced by TVEyes' unlicensed delivery of all television content, in full, on demand, and without limitation. To add insult to injury, the individual creators and authorized content aggregators' efforts and expenses invested in digitizing and indexing their licensed content to be easily searchable, accessible, and available on-demand at any time would have been for naught. The net effect of the continued viability of TVEyes, particularly with this Court's endorsement, would contravene the Constitutional and statutory principles behind the Copyright Act: creation of new materials would be

discouraged rather than encouraged, to the ultimate detriment of the public good that TVEyes allegedly promotes.

While digitization for search capability is not at issue here, TVEyes' *amici* write extensively about it, using it as an excuse for mass distribution of copyrighted content. However, to hold that a service like TVEyes, which offers *unlicensed* audiovisual content to subscribers for a fee, is fair use simply because it is "transformative" to compile and index the content so end-users can search for clips based on keywords constitutes the proverbial tail wagging the dog. Indeed, TVEyes' service goes far beyond just search— without paying for a license, it uses its copying and clipping functions to deliver full copyrighted content to subscribers and provides users unlimited access to unabridged audiovisual works at the click of a button.

*Amici* therefore respectfully request that the Court grant the relief requested by Fox News in its Brief for Plaintiff-Appellee-Cross Appellant (Dkt. No. 153).

## **ARGUMENT**

### **I. A ROBUST MARKET EXISTS FOR THE LICENSING OF AUDIOVISUAL WORKS, INCLUDING SHORT-FORM CONTENT SUCH AS VIDEO CLIPS**

*Amici* and their members create and license a wide array of copyrightable audiovisual content including videos and video clips, as well as photographs, graphical images, and music. There is a vibrant market for the licensing of

audiovisual content – one that in 2015 was valued at \$550 million globally for video footage alone.<sup>2</sup> It is this burgeoning market that is significantly imperiled by the District Court’s ruling that TVEyes’ copying, clipping, and delivering of massive amounts of copyrighted video content without permission is fair use.

The proliferation of computing technology over the last decade – particularly mobile technologies such as smartphones and tablets – has made it possible to view, stream, download, create, and share image and video content effortlessly; and this newfound ease with which to engage with the audiovisual medium has created a tremendous demand for video content which continues to grow as technology evolves.<sup>3</sup> As Google, *amicus* for TVEyes, aptly states in its

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<sup>2</sup> See Will Carleton, *ACSIL: Stock Footage Business UP 40% From 2011 Survey*, FOOTAGE NEWS (Mar. 6, 2015), <http://www.footagenews.com/acsil-stock-footage-business-up-40-from-2011-survey/> (business is “rapidly growing” for companies “who have set up dedicated units to market and sell footage”); Dru Sefton, *Public TV Stations Are Discovering Revenue Potential In Stock Footage*, CURRENT (June 4, 2015), <http://current.org/2015/06/public-tv-stations-are-discovering-revenue-potential-in-stock-footage/> (“Sales of stock footage ballooned 40 percent worldwide from 2011-15, driven by growing viewership of web video . . .”).

<sup>3</sup> See Jonathan Barnard, *Mobile To Drive 19.8% Increase In Online Video Consumption In 2016*, ZENITH OPTIMEDIA (July 31, 2015), <http://www.zenithoptimedia.com/mobile-drive-19-8-increase-online-video-consumption-2016/> (“The growth in video consumption is being driven by the rapid rise of smartphone and tablet penetration across the globe, together with the resulting changes in consumer behaviour.”); *see id.* (“Video consumption on mobile devices (such as smartphones and tablets) is forecast to grow by 43.9% in 2015 and 34.8% in 2016. Meanwhile, video consumption on non-mobile devices will continue to grow, though at more moderate rates, increasing by 9.5% in 2015 and 6.5% in 2016.”); Sam Kirkland, *Growth In Online Video News Consumption Slows*, POYNTER (March 26, 2014), <http://www.poynter.org/2014/growth-in-online-video-news-consumption-slows/244825/> (“53% of smartphone owners watch online news video” and “the appetite for video news online could still grow”); *US Adults Spend 5.5 Hours With Video Content Each Day*, EMARKETER (Apr. 16, 2015), <http://www.emarketer.com/Article/US-Adults-Spend-55-Hours-with-Video-Content-Each-Day/1012362> (“Time spent watching video on mobile devices will increase from 30 minutes daily among all US adults in 2014 to 39 minutes per day this year, and average daily video time

brief, “[v]ideo is everywhere” (Google Amicus Br., [Dkt. No. 73], at 20) – on user-generated content (“UGC”) services like YouTube, Vimeo, Vevo, and Periscope, on social media platforms like Facebook, Instagram, Vine, and Snapchat (*see id.* at 20-21), and on every major TV network and news provider’s website, including Fox News, CNN, and MSNBC. (*See Dist. Ct. Op.*, [Dist. Ct. Dkt. No. 86], at 7.)

As a general proposition, licensable video footage largely originates with licensing units of larger media organizations (such as news archives) and through “freestanding stock footage houses”<sup>4</sup> – *i.e.*, digital media content aggregators (many of which are DMLA members) such as Getty Images, iStock, Shutterstock, Pond5, Corbis, and Wazee, which maintain massive content databases.<sup>5</sup> For example, the District Court pointed out that Fox News licenses its video clips through one of these content aggregators – a clip-licensing agent called ITN Source, Ltd., which “maintains a library of over 80,000 Fox News video clips which its customers can search using keywords.” (*Id.* at 8.) The court noted that “Fox News has made approximately \$2 million in licensing fees through ITN

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on other connected devices across the US adult population will increase from 9 minutes last year to 13 minutes each day in 2015.”).

<sup>4</sup> *Association of Commercial Stock Image Licensors*, Global Survey of Stock Footage Companies 3 at 24 (2015) (hereinafter “2015 ACSIL Study”).

<sup>5</sup> Companies like these have existed for decades, and began their lives licensing stock footage to save producers the expense of starting from scratch, or providing genuine historical footage for news and documentary projects.

Source.” (*Id.*) Sites like these house millions of video clips, contributing significantly to the overall video licensing market.<sup>6</sup>

Much of the non-UGC audiovisual content (including photographs and music) that is available in today’s media-rich environment is licensed for use from these online content aggregators, who act as licensing agents for professional filmmakers and still photographers.<sup>7</sup> Content aggregators run the gamut from large collections with millions of images and videos covering myriad subjects, such as the libraries maintained by Getty Images and Shutterstock, to niche libraries specializing in subjects like nature, science, history, and news. They also provide audiovisual content relied upon by publishers, broadcasters, and media companies to illustrate newsworthy events and stories of public interest; moreover, current shifts in the media and newspaper industries have resulted in ever-increasing reliance upon these content aggregators for content that can no longer be offered by staffers.<sup>8</sup>

Anyone seeking audiovisual material can search through online databases of digitized content to find the images and footage that best suit their needs by using keywords, and this functionality is seen as a very important feature of content

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<sup>6</sup> See 2015 ACSIL Study at 32.

<sup>7</sup> See *id.* at 30.

<sup>8</sup> Some content is still created in-house or on assignment by staff (for example, by photographers and videographers employed by news agencies), but searching for and licensing existing audiovisual and visual content from online content aggregators has largely become the norm. See 2015 ACSIL Study at 30.

aggregator services.<sup>9</sup> The Internet offers efficiencies in compiling, searching, displaying, and delivering images and video clips to prospective licensees, but it was the efforts of content aggregators that created searchable digital databases making nearly instant access to *licensable* video clips and imagery possible.<sup>10</sup> While the footage licensing industry has existed in various forms for nearly 100 years, and the image-licensing industry has existed for more than 70 years, computer technology first began to ease the process of search and location as early as the mid-1980s, and the technology has grown and advanced in leaps and bounds in the years since. As a result, publishers and others can easily search, access, and license videos and images of the best content documenting news, arts, science, sports, political, and cultural events throughout the world at a moment's notice on a 24/7 basis. This on-demand, high-quality content is the heart of this critical industry that supplies the media and the public with important, newsworthy, and culturally and historically significant content.

The video usage statistics Google cites in support of the importance of video search technology (*see* Google Amicus Br. at 21) speak with equal force to the importance of the tremendous market for licensable audiovisual content discussed above. For instance, there can be no dispute as to the strength of the market for

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<sup>9</sup> *See* 2015 ACSIL Study at 48 (digitization of content results in increased efficacy, increased customer satisfaction, and increased sales).

<sup>10</sup> General search and location functions, such as Google's, do not provide a selection of works that are available for licensing.

video content in an era where the average adult in 2015 “spent an average of one hour and 16 minutes each day watching digital videos,” where the average daily time spent consuming online video is predicted to “increase by . . . 19.8%” this year, and where “IP video [is predicted to] represent 80 percent of all [online] traffic by 2019, up from 67 percent in 2014.” (*Id.*). And, importantly, much of this content – particularly on the websites of news providers and content aggregators – is short-form or clip-based<sup>11</sup> and, as discussed below, is easily impacted by TVEyes’ service.

## **II. THE DISTRICT COURT IMPROPERLY DOWNPLAYED THE SIGNIFICANT FINANCIAL HARM TVEYES’ COPYING AND DISTRIBUTION FEATURES INFLICT ON CONTENT CREATORS AND AGGREGATORS**

TVEyes’ boundless copying and delivery functionality provides a direct substitute for the diverse and robust market for licensing copyrighted video clips and other audiovisual content discussed above, which would otherwise be monetized by creators and authorized licensors. The District Court erroneously concluded that the fourth fair use factor – market harm – is “outweighed by the

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<sup>11</sup> See Ricardo Bilton, *5 Charts: The Shifting Landscape of Digital Video Consumption*, DIGIDAY (Sept. 9, 2014), <http://digiday.com/publishers/shifting-state-digital-video-consumption-5-charts/> (“Mobile video viewing lends itself to the short and snackable. Over 60 percent of overall ad views are for video less than 20 minutes . . . . Netflix design manager Dantley Davis said at a press event last week that nearly 90 percent of the service’s mobile sessions last less than 10 minutes. This stands in spite of the fact that the shortest Netflix content tends to hover around 22 minutes. As a result, the streaming giant plans to slice up its movie and TV content into five-minute clips that mobile viewers would find more digestible.”)

public benefit arising from TVEyes' services." (Dist. Ct. Op. at 25.)<sup>12</sup> It is not, and the businesses and individuals making up the membership of *amici* are, and will continue to be, harmed if such a ruling stands.

**A. TVEyes Will Usurp the Market for Content Licensed by Members of *Amici***

The fourth fair use factor directs the courts to look at "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The District Court rightly noted that this factor is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work. But this is where the correctness of the District Court's analysis ends.

The District Court improperly concluded that TVEyes' copying and delivery functions had only "very small possible impact" on Fox News' licensing revenue which, by implication, would extend to authorized licensors of copyrighted content (whether belonging to Fox News or not) and individual creators such as members of *amici*. It is inappropriate for the courts to make subjective judgments about whether a revenue stream is "significant" enough deserve protection; all income is desirable for copyright holders. Indeed, "a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an

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<sup>12</sup> As described in Section III, *infra*, the District Court's imprimatur of TVEyes' extensive copying as "transformative" directly influenced its erroneous conclusions related to market harm.

infringement.” *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985). The “normal market” for copyrighted audiovisual content includes, as discussed above, a robust clip-licensing market led by content aggregators such as members of *amici* (and a well-established still-image licensing market) which TVEyes will supplant if allowed to continue unabated. Nonetheless, under copyright law’s fair use analysis there does not have to be effects on an actual market at all, just a *potential* market. *See Harper & Row Pubs., Inc.*, 471 U.S. at 568; 17 U.S.C. § 107(4).

TVEyes and the District Court also emphasize that TVEyes’ users did not watch much of Fox’s content (*see* Dist. Ct. Op. at 23-25), but just because a taking is less substantial does not make it any less an infringement. *See Harper & Row Pubs., Inc.*, 471 U.S. at 566 (“As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the infringing work. As Judge Learned Hand cogently remarked, ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’”). With video clips as well as still images, even though particular content may not itself have been licensed (or licensed often), the fourth fair use factor is still implicated not only as to content owners like Fox News, but to other, individual creators and authorized licensors such as content aggregators.

Every lost sale of short-form video content and still-image content is significant to content creators and aggregators who seek to monetize those works; their income depends on their ability to license content and to publicize and exploit their materials to consumers. Moreover, unlicensed distribution of copyrighted works causes a domino effect, in that the primary recipients of those works (*i.e.*, TVEyes' users) can then make those works available to other users through various means on the Internet, providing free content to exponentially more users in downstream markets.<sup>13</sup> While the amount of money earned in connection with each clip or each still image may seem insignificant – as it clearly did to the District Court and TVEyes – each dollar lost as a result of this unchecked distribution is extremely significant to content aggregators, and especially harmful to individual and independent creators who maintain smaller inventories of available content to license. These works represent their livelihood, and license

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<sup>13</sup> See, *e.g.*, Alex Wild, *Bugging Out: How Rampant Online Piracy Squashed One Insect Photographer*, ARS TECHNICA (Sept. 24, 2014, 9:00pm), <http://arstechnica.com/tech-policy/2014/09/one-mans-endless-hopeless-struggle-to-protect-his-copyrighted-images/2/>; *Industry-Wide Survey Reveals 67% of Professional Photographers are Affected by Unauthorized Use of Photos*, PRWEB (Nov. 16, 2015), [http://www.prweb.com/releases/PPA\\_CopyrightMatters/PhotographersSurvey/prweb13066768.htm](http://www.prweb.com/releases/PPA_CopyrightMatters/PhotographersSurvey/prweb13066768.htm). Analogously, photographers may license their photographs to a magazine for online use, but dozens or hundreds of other websites may end up using the material without a license through means such as “framing.” TVEyes will have the same effect for audiovisual content, particularly given its downloading, sharing, and e-mailing features.

fees represent a necessary income stream to cover simple necessities like overhead and development costs.

Even more troubling is the ease with which these revenue streams are taken away. As a matter of common sense, it is extremely easy to usurp the “heart” of a short-form work or a visual image like a photograph; clips are smaller and easier to copy, digitize, and disseminate than feature-length content, and digital images are notoriously easy to copy. Many clips derive their core value from minutes or even seconds worth of content; once those moments are seen or made available for free, the work loses its licensing value. This is particularly true for clips that are newsworthy or tied to fleeting events or trends. And given the ease with which still images can be copied, those works’ value can be appropriated with a few clicks in a matter of seconds.

Under the fourth factor, courts are also supposed to analyze the effect of an allegedly infringing practice if it became widespread. TVEyes’ copying and display of video clips could destabilize the market for licensing such video clips as well as the relationships between content producers and organizations that aggregate and/or license short-form video content. And this is precisely what will happen on a larger scale with respect to other types of copyrightable content, including photographs and graphic art, longer-form video content, and even music,

should TVEyes' practice become widespread – and it will if the District Court's decision stands.

**B. The District Court's Analysis of the Fourth Fair Use Factor Contravenes the Constitutional Purpose Behind Copyright**

The fourth fair use factor (like all of the factors) must be assessed with an understanding that, if financial rewards are separated from content creation, authors may lose their ability to recoup the inevitable costs of creation and suffer a diminished incentive to create – an outcome directly contrary to the purposes of copyright law and the Constitution. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) (“The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption.”).

In his seminal article on fair use, Judge Leval explained that “the [proposed fair] use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.” Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990). However, because TVEyes does not pay for the content it takes and distributes, authors may be disincentivized from creating new content or making the content available if the desire to pay for such content no

longer exists. This phenomenon has already occurred, for instance, in the news industry, where, in the presence of so much non-remunerative content, news outlets have greatly diminished ranks of staff photographers due to an inability to fund those professionals.<sup>14</sup> Similar outcomes across many creative industries would not only injure content creators whose livelihoods would be compromised, but would also harm the public, which would be deprived of new and potentially significant and valuable works, and directly impact the ability of content aggregators to sustain their businesses.

In addition to diminished inventory, content aggregators like members of *amici* have invested significant time, money, and effort in organizing and digitizing their content, as well as maintaining it securely and ensuring that it is compatible with new platforms and new technologies.<sup>15</sup> “[C]ollections are increasingly

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<sup>14</sup> See, e.g., Robert Levine, *How The Internet Has All But Destroyed The Market For Films, Music and Newspapers*, THE GUARDIAN (Aug. 13, 2011), <http://www.theguardian.com/media/2011/aug/14/robert-levine-digital-free-ride>. Cf. Kim Peterson, *Why Sports Illustrated Laid Off All of Its Photographers*, CBS NEWS (Jan. 26, 2015, 5:45 AM), <http://www.cbsnews.com/news/why-sports-illustrated-cut-all-of-its-photographers/>.  
<sup>15</sup> See, e.g., Sefton, *supra* 2 (“The cost of digitizing old footage from film and video formats is one of several hurdles stations face as stock-footage suppliers. Footage is now routinely shot digitally, but huge caches of materials that buyers want need reformatting.”); *id.* (local stations, along with American Archives, partnered with Corporation for Public Broadcasting in 2009 “to disseminate \$3 million in grants to help stations identify, catalog and digitize old content”); *AP Announces Full Digital Expansion Of Its Stock Footage Business With Launch of New Video Archive Platform*, THE ASSOCIATED PRESS (Sept. 12, 2012), <http://www.ap.org/Content/Press-Release/2012/AP-announces-full-digital-expansion-of-its-stock-footage-business-with-launch-of-new-video-archive-platform> (Associated Press invested in “a multimillion-dollar upgrade to transform AP’s entire video business” into a digitized video archive platform that users can use to “search, organize and share research”); Patrick Montgomery, *The Stock Footage Industry Today*, in FOOTAGE: THE WORLDWIDE MOVING IMAGES SOURCEBOOK (Philip Kadish et al. eds.,

digital, and the marketing and delivery of these collections” have been “automated and shifted online,” a transformation that occurred largely between 2007 and 2011.<sup>16</sup> Those who built digital content libraries invested substantial labor to reach this point, and must continue to expend time, money, and human resources to ensure their collections meet demands and are up to technological snuff. If content can merely be taken based on an overly broad judicial interpretation of fair use, eventually there will not be enough revenue for content aggregators to continue to maintain content in electronic form, and their prior efforts in connection with technological advances will have been in vain. In turn, a vast amount of history (particularly analog works that require digitization for preservation purposes) will be lost because there will be no financial incentive to invest in preserving the works if the licensing market is substantially eroded.

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1997) at A-32 (“The most successful [stock footage] libraries are the ones that have put a lot of work into organizing and cataloging their footage so that the shots clients request can be found and provided quickly. This requires a large investment in equipment and time; to be successful, a library needs to have a wide variety of footage ready to go without knowing exactly what its clients will want.”); *New Study Charts Evolution Of Stock Footage Industry*, FOCAL INT’L (Jan.11, 2012), <http://www.focalint.org/member-news/news/1230/new-study-charts-evolution-of-stock-footage-industry> (“As might be expected given the levels of investment in digitization, footage companies have become more productive and average headcount has declined since 2007.”).

<sup>16</sup> 2015 ACSIL Study at 34. The vast majority of footage licensors have 75% - 100% of their collections digitized, up from 22% in 2007 and 31% in 2011. *Id.* at 47.

**III. THE DISTRICT COURT IMPROPERLY DETERMINED THAT TVEYES' COPYING AND DELIVERY OF UNLICENSED CLIPS WAS TRANSFORMATIVE BECAUSE IT CONTRIBUTES TO A PUBLIC BENEFIT**

There is no dispute that TVEyes is a commercial content delivery system that pushes out content through a for-profit subscription service. (*See* Dist. Ct. Op. at 6 (“TVEyes is a for-profit company with revenue of more than \$8 million in 2013. Subscribers pay a monthly fee of \$500, much more than the cost of watching cable television.”).) The District Court nonetheless held that, under the first fair use factor the “excerpting [of] *all content appearing on television*, every hour of the day and every day of the week, month, and year” is fair use because TVEyes “provides a service that no content provider provides.” (*Id.* (emphasis added).) Moreover, *amici* for TVEyes claim that aggregation, indexing, and search functionalities are for the good of the public, but this is a thin veil to hide TVEyes’ underlying *copying and delivery* of unlicensed content from 1,400 television and radio stations, 24 hours a day, seven days a week, to paying subscribers, which are not transformative. The District Court’s analysis under the first fair use factor was wrong.

**A. This Case Is Distinguishable from the *Authors Guild* Cases Because TVEyes Delivers Full Copies of Copyrighted Works Without Any Limitations on Use**

The Supreme Court has stated that “[t]he central purpose of th[e] [fair use] investigation is to see, in Justice Story’s words, whether the new work merely

‘supersede[s] the objects’ of the original creation [citations omitted], or instead adds something new, with a further purpose or different character, *altering the first with new expression, meaning or message . . . .*” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (emphasis added). The District Court’s ruling focused not on whether an alleged infringer contributes new expression, meaning, or message, but instead concentrated on the subjective notion of “public benefit,” relying on recent yet inapplicable decisions.

For instance, in *Authors Guild v. Google, Inc.*, this Court found “that Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose.” 804 F.3d 202, 216 (2d Cir. 2015); *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014). Specifically, “Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information *about* Plaintiffs’ books.” *Id.* at 207. However, both *Google* and *HathiTrust* were limited by the fact that members of the public were only able to access limited portions of the underlying digitized works once the search was performed. *See Google*, 804 F.3d at 226; *HathiTrust*, 755 F.3d at 91. In the case of Google Books, every tenth page of a work was excluded, and while snippets were accessible, full works were not available for reading. *See Google*, 804 F.3d

at 209-10. HathiTrust's digital store of books did not even offer snippet views, and only provided the page numbers on which a search term was found within the work and the number of times the term appeared on each page. *See HathiTrust*, 755 F.3d at 91. The transformative nature of HathiTrust's library of content also included, unlike here, accessibility for blind or other print-impaired people. *See id.* at 102.

The District Court here expands the fair use analysis far beyond the scope of this Court's two book digitization decisions. Unlike Google Books and HathiTrust, TVEyes allows *paying* subscribers who search its massive database of unlawfully copied material to access *full* audiovisual works after identifying those works through search, works which can then be viewed without restriction or abridgment. In other words, TVEyes delivers complete, unlicensed copyrighted works to subscribers and allows unfettered access to those works after its purportedly transformative function has been utilized. The precedent TVEyes and the District Court rely upon for their transformative use rationale are factually to the contrary: they do not remotely suggest that a database service can deliver unlicensed copies of copyrighted works to paying subscribers for unlimited and unrestricted use.

While TVEyes' clips "are limited to ten minutes" each, and the District Court did not believe that TVEyes users were actually streaming back-to-back ten-

minute clips, it acknowledged that subscribers can “play unlimited clips from television broadcasts.” (Dist. Ct. Op. at 6.) Unlike Google Books or HathiTrust, nothing prevents users from viewing all of any content owners’ copyrighted content. Indeed, TVEyes touts, in its advertising and marketing materials, that its users can “watch live TV, 24/7,” “download unlimited clips” of high-definition television programming, and “watch live-streams of everything we are recording.” (*Id.*) Delivery of high-definition copies of copyrighted programming is not a transformative use; it is a clear infringement of multiple exclusive rights under the Copyright Act. *See* 17 U.S.C. § 106.

**B. The District Court’s Analysis Provides a Blank Check to Those Claiming to Provide a Previously Unavailable Service to Assert Fair Use Without Regard to the Rights of Copyright Owners**

Under the District Court’s analysis, an alleged infringer who, without authorization, reproduces original, copyrighted works and provides users with the ability to view entire resulting clips is automatically protected by the fair use doctrine if the infringer merely provides a novel service or technology that a court vaguely dubs a “public benefit.” But mass copying without any conditions or restrictions to maintain the works securely is not transformative and does not qualify as fair use, which is meant to be applied on a case-by-case basis. The District Court’s broad interpretation would allow the fair use exception, once and for all, to swallow the rule. *See Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d

Cir. 2000) (where the Copyright Act “sets forth exceptions to a general rule, we generally construe the exceptions ‘narrowly in order to preserve the primary operation of the provision’”) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)). Left behind would be a vast loophole that would allow any party that copies works wholesale on a massive scale to satisfy the central first-factor test of transformative use by simply identifying some feature of its activities that serves a social benefit.

Critically, the District Court’s decision disregards the rights of copyright holders to choose whether to make their works available through online content aggregation services, and on what terms. *See, e.g., Google*, 804 F.3d at 212 (“The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their work.”); 17 U.S.C. § 106. Moreover, some content creators may be concerned with the extensive piracy that invariably accompanies the availability of unsecured, online digital copies. Given that piracy can cannibalize an entire market, content creators would be rightfully cautious about who may digitize and have access to unsecured digital copies of their works for fear that perfect, unsecured, free copies will become viral and paying markets for the works

will consequently dry up.<sup>17</sup> There is nothing in the District Court’s analysis that would prevent an entity completely lacking in secure technologies from making the same uses as TVEyes.

Moreover, staking the fair use analysis on “public benefit” where users ultimately can access full works by means of sophisticated digital delivery will create a slippery slope. For instance, search engines and peer-to-peer networks that index and distribute all manner of content – from video clips to high-quality photographs to high-fidelity music and premium software programs – may deliver these copyrighted works, in full, in response to a user’s query and claim fair use simply because they provided the ability to aggregate and digitally deliver. To deem such activity fair use would be unprecedented and would contravene already established law. *See, e.g., A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

A work is *not* transformative where the new work “merely ‘supersede[s] the objects’ of the original creation . . . .” *Campbell* at 510 U.S. at 578 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)). Yet that is exactly what TVEyes offers – copies of the entirety of original works available for public consumption without restriction through the guise of a previously unavailable

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<sup>17</sup> To the extent they are comfortable with their works being available, some creators may prefer that only low-resolution copies be provided in order to discourage piracy.

service. Courts have found significantly less than wholesale copying to not be transformative, *see, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 198, 200 (3d Cir. 2003) (“informational” purpose of clip previews did not make defendant’s use of plaintiff’s motion pictures transformative), and this Court should not deviate in the case of TVEyes.

**C. The District Court’s Interpretation of Transformative Use Contravenes the Constitutional Purpose Behind Copyright Law**

As this Court has previously recognized, and as discussed above, the Constitutional purpose of copyright is to incentivize creation of content for the benefit of the public. *Google*, 804 F.3d at 212; Leval, *supra*, at 1110. Allowing TVEyes’ unlicensed content delivery system to proceed unabated distorts the playing field vis á vis authorized licensors like the content aggregators constituting the membership of *amici*, and removes the incentive for authors to create.

Content creators need to be compensated for their work, and where a massive online content aggregator like TVEyes offers unlimited access to a tremendous amount of content without paying, the financial incentives to disseminate works that are specifically intended to further human knowledge are undermined. The domino effect is to reduce, or at worst, cut off, the supply of copyrighted works that is the lifeblood of the content aggregators who license those works to the public and to the media – all in the name of an alleged technological process for the “public benefit.”

To the extent this Court considers the legality of searching and indexing, the District Court and TVEyes' *amici* also fail to recognize that those features were available long before TVEyes came into being. As such, the District Court's analysis related to TVEyes' novelty falters given that TVEyes substitutes for authorized services in an existing market. Search and indexing are standard features used to locate content in any modern digital database. Indeed, licensing visual and audiovisual content such as video clips through indexed searching is, as mentioned above, an established business model that members of *amici* have already engaged in for years, and its social benefit is already manifest. The difference between the existing digital aggregation businesses who utilize search functionalities and TVEyes is that TVEyes does not pay for its content, whereas other content aggregators have license agreements in place to compensate copyright owners.

To stifle the Constitutional purposes of copyright protection by permitting mass copying and delivery of content in the name of an existing socially beneficial feature used by authorized licensors of copyrighted content is illogical and inappropriate, and, moreover, contrary to the established principle that where a "public benefit" can "be accomplished by other methods," a finding of fair use is inappropriate. *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108-09 (2d Cir. 1998); *see also WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 288 (2d Cir. 2012) (where

“the public will still be able to access [television] programs through means other than [such] Internet service[s], including cable television,” there is no reason to distort traditional copyright principles).

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A perceived public demand or social good cannot justify a judicial expansion of fair use of this magnitude. *See Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006) (stating that public policy arguments submitted to the district court are “inconsequential to copyright law” and “addressed in the wrong forum” because the “Court is not free to determine the social value of copyrighted works”). This Court should not countenance such an expansion and should reverse the District Court.

### **CONCLUSION**

For the reasons set forth above, *amici curiae* respectfully request that the Court grant the relief requested by Fox News in its Brief for Plaintiff-Appellee-Cross Appellant (Dkt. No. 153).

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

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